Office-Supreme Court, U.S.
FILED
MAR 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1445

In the Supreme Court of the United States

OCTOBER TERM, 1980

PATRICIA CAMPBELL HEARST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to the effective assistance of counsel was violated because the attorney who represented her at trial had an arrangement to write a book about the trial.

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OPINIONS BELOW

The opinion of the court of appeals in these proceedings under 28 U.S.C. 2255 (Pet. App. A-1 to A-20) is reported at 638 F. 2d 1190. The opinion of the district court on petitioner's motion under 28 U.S.C. 2255 (Pet. App. A-21 to A-63) is reported at 466 F. Supp. 1068. The opinion of the court of appeals affirming petitioner's conviction is reported at 563 F. 2d 1331, and this Court's denial of the petition for a writ of certiorari is reported at 435 U.S. 1000.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1980, and the petition for rehearing was denied on January 15, 1981. The petition for a writ of certiorari was filed on February 24, 1981. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of armed robbery, in violation of 18 U.S.C. 2113(d), and using a firearm to commit a felony, in violation of 18 U.S.C. 924(c)(1). She was sentenced to concurrent terms of seven and two years' imprisonment. The court of appeals affirmed (563 F. 2d 1331), and this Court denied certiorari (434 U.S. 1000). Thereafter, the district court denied her petition for collateral relief without a hearing (Pet. App. A21-A63).[1] The court of appeals reversed and remanded for an evidentiary hearing (Pet. App. A-1 to A-20).[2]

1. On April 15, 1974, petitioner, armed with an automatic weapon, accompanied members of the Symbionese Liberation Army (SLA) as they robbed a bank in San Francisco, California. Before the robbery, petitioner, who had been kidnapped by members of the SLA on February 4, 1974, issued a tape-recorded communique stating that she had adopted the ways of her captors and had chosen to "stay and fight". Shortly after the robbery, on April 26, 1974, the SLA issued another taped communique in which petitioner acknowledged that she had participated willingly in the bank robbery and that her weapon had been loaded at the time (Pet. App. A22).

On May 16, 1974, two members of the SLA were detained for shoplifting inside a Los Angeles, California sporting goods store. Petitioner, waiting alone outside the store,

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[1]While petitioner's appeal in these proceedings was pending, President Carter commuted her sentence; she was released from imprisonment on February 1, 1979.

[2]The court of appeals also remanded the case for reconsideration of a discovery motion that petitioner had made in the district court. It affirmed the judgment of the district court as to other matters that are not raised in the instant petition.

became aware of the apprehension of the two SLA members and discharged an automatic weapon at the store in order to free them. The three then kidnapped a passerby and stole his van to facilitate their escape. While riding in the van, petitioner told the kidnap victim that she had voluntarily participated in the bank robbery with a loaded gun (Pet. App. A22).

Testifying in her own behalf at trial, petitioner detailed her activities from the date of her kidnapping in February 1974 until September 1974, but said nothing about her whereabouts from that time until September 18, 1975, the day of her arrest (Tr. 1401). She maintained that from the date of her kidnapping until after her arrest, all of her actions had been motivated by fear of the SLA and, hence, that her participation in the bank robbery had been coerced. On cross-examination, petitioner asserted the privilege against self-incrimination on a number of occasions when questioned about the period between September 1974 and September 1975 (Pet. App. A23).

2. At her trial, petitioner was represented by F. Lee Bailey and his associates. After petitioner's conviction was affirmed and certiorari was denied, she fired Bailey. Thereafter, she filed a motion under 28 U.S.C. 2255 collaterally attacking her conviction on the ground, *inter alia*, that Bailey had provided her with ineffective assistance of counsel at trial. She contended that Bailey pursued his own interest in contracting to write a book about her trial rather than pursuing her interest in acquittal. In particular, petitioner alleged that Bailey's interest in the book caused him not to seek a continuance or a change of venue and led to his decision to have her testify at trial (Pet. App. A5).[3]

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[3]Petitioner asserted that Bailey (1) failed to seek a continuance so that public interest in the case would not cool and other authors would not get a jump on him; (2) failed to seek a change of venue because media

In an affidavit submitted in the Section 2255 proceeding, Bailey stated that, prior to completion of the trial, he signed a contract with a publisher to write a book about the trial but that the contract was made contingent upon petitioner's agreeing not to write a book about her experiences for 18 months following publication of Bailey's book. Bailey averred that he told the publisher that he would not submit such an agreement to petitioner while the trial was pending. On March 22, 1976, two days after her conviction, petitioner signed a letter to the publisher in which she agreed to cooperate with Bailey in his writing of a book and not to publish an account of her experiences until 18 months after publication of Bailey's book (Pet. App. A3).

Petitioner's father declared in an affidavit that, some time prior to trial, he discussed with Bailey the possibility of the latter's writing a book about the trial but did not consider book rights to be part of a fee arrangement for the representation at trial. Petitioner's father further averred that after trial, one of Bailey's associates told him that Bailey wanted to write a book about the trial and that this would be part of the fee arrangement for appeal. Petitioner's father stated that he told Bailey's associate that he had no objection to this arrangement (Pet. App. A4).

Petitioner stated in an affidavit that Bailey's associate had told her prior to trial that Bailey would write a book about her and that book rights were part of the fee arrangement her parents had made. She declared that she was told she had to agree to the arrangement but was not to discuss it, and that the associate would one day ask her to sign a paper relating to it (*ibid.*).

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coverage would be maximized in San Francisco; and (3) put petitioner on the stand so that her story would be a matter of public record and he would not be constrained by ethical rules requiring a lawyer to protect his client's confidences.

Without holding a hearing, the district court denied the Section 2255 motion on the basis of the record of the original case and the additional affidavits and exhibits (Pet. App. A26-A27). The court of appeals reversed and remanded for an evidentiary hearing. The court of appeals instructed the district court to consider the evidence adduced at the hearing in light of this Court's decision in *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), which was decided after the district court first ruled on the Section 2255 motion (Pet. App. A7-A8).

ARGUMENT

In *Cuyler* v. *Sullivan*, *supra*, this Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance" (446 U.S. at 348; footnote omitted). Petitioner argues (Pet. 10-14) that this holding applies only in cases of multiple representation and not where a lawyer's personal interests may conflict with those of a defendant. Thus, she argues that the quoted rule was premised on the Court's previous observation in the opinion that a possible conflict of interest inheres in almost every instance of multiple representation and that a reviewing court therefore cannot presume in all cases that the possibility has resulted in ineffective assistance of counsel; to do so, the Court reasoned, would preclude multiple representation even in cases where a common defense might strengthen the defense (446 U.S. at 348). In contrast to situations of multiple representation, petitioner argues that there could never be a countervailing benefit to a defendant resulting from his lawyer's undertaking, prior to trial, to write a book about the case. Accordingly, she urges the Court to grant certiorari in this case and to adopt a per se rule that a defense lawyer's prior agreement to write a book about a criminal trial automatically requires the setting

aside of the conviction without the need for the defendant to demonstrate that the lawyer's performance was adversely affected by the book arrangement.

Whatever the soundness of the per se rule petitioner proposes, we believe it would be premature for the Court to consider it here. The ruling of the court of appeals places petitioner in precisely the same position she would have been in if the district court had ordered an evidentiary hearing in the first instance. Petitioner would have had no right to interlocutory review of such an order. In addition, the issue petitioner raises can be better resolved on the basis of a complete record after both parties have had an opportunity to examine or cross-examine all material witnesses and the district court has made a factual determination whether or in what manner Bailey's performance was affected by the possibility of his writing a book. If the district court were to find that Bailey's performance was "adversely affected" and the court of appeals were to affirm, petitioner would have no occasion to seek relief in this Court. Conversely, if the two courts below reject her Sixth Amendment claims after a hearing, she will then be able to present all of her contentions to this Court in a petition for a writ of certiorari seeking review of a final judgment. We submit, therefore, that review by this Court of the decision of the court of appeals would be premature.

In any event, there are obvious difficulties with petitioner's suggested per se rule. The Sixth Amendment guarantees an accused the "effective" or "adequate" assistance of counsel. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 343-345, 349; *Holloway* v. *Arkansas*, 435 U.S. 475, 481, 483 (1978); *Glasser* v. *United States*, 315 U.S. 60, 76 (1942). If a lawyer makes tactical decisions at trial that he would have made even in the absence of the asserted conflict of interest—and if those tactical decisions are within a range of competence that is otherwise acceptable under the Sixth Amendment—

then it would seem that the defendant has not been deprived of the "effective" or "adequate" assistance of counsel despite the asserted conflict of interest. The rule announced in *Cuyler* that a defendant attacking his conviction on conflict-of-interest grounds must show that the conflict of interest "adversely affected" his lawyer's performance therefore serves to ensure that an otherwise valid conviction will be set aside only upon a showing that the lawyer's assistance was, in fact, ineffective. It is not clear why a different constitutional rule should apply simply because, as in this case, the asserted conflict of interest arose because of the lawyer's interest in writing a book about the trial.

To be sure, as petitioner points out (Pet. 11 n.4; 14-15 n.5; 15-16 n.6), the courts and the bar generally have disapproved of defense counsel's entering into an agreement, before the prosecution has been completed, to write about a trial. But as the Court observed in *Cuyler* v. *Sullivan, supra* (446 U.S. at 346-347 & n.11), a lawyer has a similar ethical obligation to avoid conflicts of interest that may result from multiple representation, whether or not a particular client ultimately is prejudiced thereby; nonetheless, the Court held in *Cuyler* that a defendant can establish a constitutional violation only if he shows that the conflict of interest (the ethical violation) adversely affected the assistance he actually received from the lawyer (*id.* at 346-348; see also *Holloway* v. *Arkansas, supra*, 435 U.S. at 488-489). Again, it is not apparent why a different rule should obtain where the ethical violation concerns the lawyer's book contract.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

DOJ-1981-03